

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

V

RECOVERY SOLUTIONS LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 279:21 unpaid minimum wage

Claimant: Benjamin Berry, 16 Coburn Hill Road, Danville, NH 03819

Employer: Recovery Solutions LLC, PO Box 1404, Derry, NH 03038

Date of Hearing: April 19, 2016

Case No.: 52373

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on February 24, 2016. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on March 28, 2016.

The claimant testified that he worked for the employer for eight months. He further testified that he was paid per call answered and attended. The position was that of a tow truck driver.

The claimant testified that his earnings were under the set minimum wage standard. The claimant submitted his hours worked that he kept tracking while working. The records submitted show days with multiple hours worked; and one day, in which the claimant worked for twenty-four hours. He testified that his earnings compared to the hours worked brought him well below the minimum wage standard. The claimant also testified that he had to remain at the employer's work site because he was not allowed to take a truck home with him.

The employer testified that the claimant was allowed to take a vehicle home with him; but due to the nature of the business, there were multiple entities that sought the assistance of a tow truck, and the quicker response the better. The employer also testified that the claimant was hired on a commission wage plan. The employer said that the claimant would receive one third of all charges assessed for the tow services or the equipment call. The employer further stated that their rate was above the standard rate compared to other similar companies that cover the same region.

The employer stated that all checks received by the claimant were paid on the basis of commissions earned and not an hourly wage. It was the practice that the more calls you responded to, the more money you made. The employer testified that the company did not pay for time sitting in a truck or waiting for a call. It was strictly a commission wage based on the cost of the service call.

FINDINGS OF FACT

RSA 275:43 I Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 279:21 Minimum Hourly Rate. – Unless otherwise provided by statute, no person, firm, or corporation shall employ any employee at an hourly rate lower than that set forth in the federal minimum wage law, as amended.

This part of the law sets the minimum wage for the State of New Hampshire.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden.

The Hearing Officer finds that both parties testified to a pay structure based on a call for service. The record keeping by the claimant shows hours spent waiting for a call. The employer testified that the wage structure was for a payment of one third of the service fee going to the driver.

It is also found that the claimant did not prevail in his position that he was required to be present for, in at least one case, twenty four straight hours, to answer calls. It was not clear that the claimant could not do anything personal while on call. What is clear is that the claimant received and answered a call for service was paid for that call. It was to the employee's advantage to wait for calls and to take as many calls as possible to increase his/her wages.

The Hearing Officer finds that the hours in question did not constitute time worked. The only time that was paid was the percentage of the service fee given to the employee.

The employer also testified credibly that the claimant never challenged the pay system while working for the company.

The Hearing Officer finds that the claimant was paid all wages due and that the Wage Claim is invalid.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: May 11, 2016

Original: Claimant
cc: Employer

TFH/aph